33-63.

SUPREME COURT OF THE UNITED STATES.

No. 108.

WILLIAM J. SLICER AND AL., HEIRS OF THOS. CROMWELL, DECEASED, APPELLANTS,

vs.

THE BANK OF PITTSBURGH.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE WESTERN DIST. OF PENNSYLVANIA.

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GIDEON, Print.

Among the rolls, records and judicial proceedings of the circuit court of the United States for the western district of Pennsylvania, in the third circuit, may be found the following words and figures, viz:

Bill in equity—Filed April 14th, 1853.

WILLIAM J. SLICER, a citizen of the State of Maryland, LAWRENCE SLICER, WM. CROMWELL SLICER and MARCELLA SLICER, minors in the State of Maryland, by their father and next friend Wm. J. Slicer, a citizen of the State of Maryland, MARTHA VIRGINIA BERKLEY, a citizeness of the State of Virginia, and Dr. JEREMIAH BERRY and THOS. CROMWELL BERRY, citizens of the State of Missouri,

vs.

THE BANK OF PITTSBURGH, a body corporate and politic by the laws of Pennsylvania, and located in the western district of Pennsylvania.

No. 1, Nov. term, 1853. Subpœna issued, returnable to the first Monday of June next, 1853. April 15th, subpœna returned, served, and cause docketed.

Copy of Bill.

In the circuit court of the United States for the *United States for the* Western district of Pennsylvania.

CROMWELL'S HEIRS vs. BANK OF PITTSBURGH and others. } Bill in equity.

William J. Slicer, a citizen of the State of Maryland, Lawrence Slicer, William Cromwell Slicer, and Marcella Slicer, minors in the State of Maryland, by their father and next friend, William J. Slicer, a citizen of Maryland, Martha Virginia Berkeley, a citizen of the State of Virginia; and Dr. Jeremiah Berry and Thomas Cromwell Berry, citizens of the State of Missouri, bring this their bill against the "Bank of Pittsburgh" and "Mount Union Cemetery," bodies corporate and politic by the laws of Pennsylvania, and located in the western district of Pennsylvania; and Thomas Biddle, Joseph H. Dullis, John Sampson, James Anderson, Cyrus Townsend, Wheeler H. Phelps, William Martin, Mary Burgess, Jacob Goss, jr., and Jacob Goss, sen., citizens of the State of Pennsylvania.

Whereupon, your orators, humbly complaining, give your honorable court to be informed that Thomas Cromwell, of whom your orators are heirs at law, as will be more fully seen and made manifest by the pedigree hereinafter set forth at large, was seised in his demesne as of fee

to a large tract of land, containing one hundred and seventy acres of land, situate in the county of Allegheny, at or nearly adjoining the city of Allegheny, in said western district of Pennsylvania; and also a certain lot of land situate in the city of Pittsburgh, in said western district of Pennsylvania, and being so seised, the said Thomas Cromwell, to secure a debt of twenty thousand one hundred dollars, which the said Thomas then owed to the Bank of Pittsburgh, a body corporate under the laws of the Commonwealth of Pennsylvania, executed his mortgage in fee, the mortgage of the said Thomas to the said Bank of Pittsburgh, on the thirteenth day of May, in the year of our Lord one thousand eight hundred and nineteen, which mortgage was duly recorded according to the laws of the Commonwealth of Pennsylvania, and a duly certified exemplification of the same is herewith filed and marked "A" as an exhibit in this cause, and is prayed to be made and taken as a part of this your orator's bill.

And your orators give your honorable court to understand and be informed, that the said Bank of Pittsburgh did, on the ninth day of June, in the year of our Lord one thousand eight hundred and twenty, cause a scire facias sur mortgage on the mortgage aforesaid to be issued out of the court of common pleas of Allegheny county, in the Commonwealth aforesaid, which court of common pleas had full jurisdiction of the cause; the service of which scire facias was accepted by the said Thomas Cromwell, but which service of the scire facias was never returned according to law by the sheriff of Allegheny county; unless a statement of service, endorsed on an envelop to said writ of scire facias, and not attached thereto, can be considered as a legal return.

And your orators give your honorable court to be informed, that without any judgment being entered on said scire facias sur mortgage, the Bank of Pittsburgh caused a writ of levari facias to be issued out of the court of common pleas of Allegheny county as aforesaid, on said suit of scire facias sur mortgage, and all the lands described in the said mortgage, to be levied on by virtue of said levari facias, and caused the same to be sold at public outcry by the sheriff of Allegheny county as aforesaid; and at which sale or outcry the Bank of Pittsburgh, plaintiff in said suit of scire facias, and plaintiff in said writ of execution called levari facias, became the purchaser of all the lands levied and sold and described in said mortgage, being the one hundred and seventy acres of land adjoining and near the city of Allegheny as aforesaid, and the lots in the city of Pittsburgh as aforesaid.

And your orators give your honorable court still further to understand and be informed, that on the first day of December, in the year of our Lord one thousand eight hundred and thirty-five, the Bank of Pittsburgh by her attorney, Mr. Bradford, moved the court of common pleas of Allegheny county aforesaid, for a rule on Thomas Cromwell, defendant in the suit of scire facias, then pending in said court as aforesaid, to show cause on the second Monday of December, in the year of our Lord one thousand eight hundred and thirty-five, why the record in the said scire facias sur mortgage, &c., should not be amended by

the entry on the docket as of September the thirteenth, in the year of our Lord one thousand eight hundred and twenty, of the "judgment which appears amongst the papers in the case." The rule was granted, and on the fourteenth day of December, in the year of our Lord one thousand eight hundred and thirty-five, the same was made absolute, and judgment nunc pro tunc entered in favor of the Bank of Pittsburgh, by Harvey Peterson, esq., the then prothonotary of the court of common pleas aforesaid, as of September the thirteenth, in the year of our Lord one thousand eight hundred and twenty.

And your orators further give your honorable court to understand and be informed, that the Bank of Pittsburgh, by her attorney Mr. Bradford, did, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and thirty-six, move the court of common pleas aforesaid, that the levari No. 89, Nov. term, 1820, the levari facias which has been issued as aforesaid, in said scire facias sur mortgage suit as aforesaid, should be amended, "by inserting the 13th day of September, 1820, instead of the 13th day of May of the same year, so as to conform to the judgment;" which motion was allowed, and order and entry of record accordingly.

And your orators aver, that all of the preceding statement is fully sustained and made manifest by the exemplification of the record of said scire facias sur mortgage No. 136, August term, 1820, of said court of common pleas, which is marked "B," and herewith filed as an exhibit, and prayed to be made and taken as a part of this your orators' bill.

And your orators give your honorable court still further to understand and be informed, that the "judgment found among the papers of the case," as set forth in the motion of Mr. Bradford as aforesaid, is in these words and figures, that is to say:

"ALLEGHENY COUNTY, *ss.*

No. 136, August term, 1820.

"THE BANK OF PITTSBURGH
vs.
THOMAS CROMWELL. } Sci. fa. sur mortgage.

"In my proper person I this day appeared before the prothonotary, in his office, and confessed judgment to the plaintiff for $21,740 40, besides costs, with a release of all errors without stay of execution, and that the plaintiff shall have execution by levari facias to November term, 1820. THOMAS CROMWELL."

Which paper was endorsed: "Filed September 13th, 1820.
WM. PENTLAND."

And your orators assert and expressly charge, that the body of the writing of said paper was neither in the handwriting of the said Thomas Cromwell, nor in the handwriting of the prothonotary of said court of common pleas, but in the handwriting of the attorney of the Bank of Pittsburgh, and executed and signed by the said Thomas in

the office of the attorney of the Bank of Pittsburgh, and was never intended by the parties, as the contents of said paper fully show, to give any authority or warrant to any person to confess or enter judgment in favor of said Bank of Pittsburgh, against the said Thomas Cromwell; and that the said paper is not any part of the record of the said court of common pleas, neither can the same be received as such by the law of Pennsylvania, any more than the parol declaration of any person could, by the law of Pennsylvania, establish a judgment of a court of record of said State of Pennsylvania, until the ground for the admission of such parol proof was first laid, by showing the loss of the record of the judgment, which such parol evidence was intended to supply.

And your orators aver, that the said Bank of Pittsburgh, by herself or her tenants, have been in possession of all the aforesaid mortgaged premises, from the time of the sale on the levari facias as aforesaid, until the filing of this your orators' bill; and that the said Bank of Pittsburgh is justly and equitably liable to account to your orators for all the rents, issues, and profits received, or which might have been received by them since such possession; and that after being credited with the full amount of the mortgage, debt, and interest, the residue of said profits, with interest, should be paid to your orators as the parties justly entitled to receive the same.

And your orators aver, that as no account of the rents, issues, and profits of said estate, which has or might have been received by said Bank of Pittsburgh, has ever been rendered to your orators, they can only approximate to the value of same by general principles; from which, however, they aver, that the said Bank of Pittsburgh has, or might have had, received of said rents and profits more than one million of dollars, and which the said Bank of Pittsburgh would be justly liable to pay to your orators, over and above the sum secured by the mortgage aforesaid, if made to account according to the rules of your honorable court.

Yet so it is, if it please your honorable court, the said respondents pretend that they are not liable to account to your orators in the premises; because they allege, that the void proceedings on the levari facias as aforesaid, and sale and entry thereunder, was an adverse entry on the mortgaged premises aforesaid, and which adverse holding has continued from that time to the present; and, therefore, the entry by your orators is *tolled* at law, and barred by the rules of equity; though they well know, that by the laws of Pennsylvania the levari facias levy and sale on the scire facias sur mortgage aforesaid is utterly null and void, and that by operation of law the said Bank of Pittsburgh is only a mortgagee, and in by force of the mortgage; and that the scire facias is, from the time of the impetration of the said writ of scire facias until now, a good, valid, and subsisting recognition of the mortgage as aforesaid, and that the same is not foreclosed, and neither can be, by the law of Pennsylvania, until judgment on the scire facias sur mortgage aforesaid, and levy and sale in accordance

with, and in pursuance of, said judgment; and that by the law of Pennsylvania your orators have the right to account, and to redeem said mortgaged premises, until said equity of redemption is foreclosed as aforesaid.

And your orators charge, that the said Bank of Pittsburgh, and "Mount Union Cemetery," bodies corporate and politic by the laws of Pennsylvania, and located in the western district of Pennsylvania, and Thomas Biddle, Joseph H. Dullis, John Sampson, James Anderson, Cyrus Townsend, Wheeler H. Phelps, Wm. Martin, Mary Burgess, Jacob Goss, jr., and Jacob Goss, sr., citizens of the State of Pennsylvania, the vendees of the Bank of Pittsburgh of said mortgaged property, refuse to account and to redeem, and say that they are not liable to this your orators' bill for an account, and to redeem; because they say that they claim right and title, by adverse possession, of said mortgaged premises, for more than twenty-one years; though they well know that they entered upon the same, by virtue of a conveyance in fee, by the Bank of Pittsburgh, as mortgagee as aforesaid, and well knew that the said Bank of Pittsburgh had no right, and claimed no other right, than such as she derived from the mortgage of the said Thomas Cromwell as aforesaid, and that the equity of redemption was never foreclosed thereon.

And your orators aver, that they are ready and willing, and anxious and desirous, to pay to the said Bank of Pittsburgh every dollar secured by said mortgage, with interest and costs thereon, if said Bank of Pittsburgh would render an account of the rents, issues, and profits thereof, which she has or might have received since she was in possession thereof; but your orators expressly charge, that though often requested to furnish such account, showing the balances due, if any, the said Bank of Pittsburgh has hitherto wholly refused, and still doth refuse, affecting that she is not bound in law or equity to account, or permit your orators to redeem, but that she and her vendees are entitled to hold, and do hold, the aforesaid described mortgaged premises, free and clear from all equity of redemption whatever.

Thomas Cromwell, the mortgagor aforesaid, your orators give your honorable court to understand and be informed, was intermarried with Ann Slicer, on the first day of January, in the year of our Lord one thousand seven hundred and ninety-nine, and had issue by her nine children, viz: Thomas, Ann, Rebecca, Margaret, Ellen, Susannah, Jane, William, who died without issue in the lifetime of the said Thomas; and Matilda, who intermarried with William Slicer, of the State of Maryland, one of the complainants in this bill, leaving issue living, and parties to this bill, William Cromwell Slicer, Lawrence Slicer, and Marcella Slicer, minors, who sue by their father and guardian, the said William Slicer; and the said Thomas Cromwell had issue as aforesaid, Eliza, who intermarried with the Rev. James Berkley, of Virginia, who with her husband, the said Rev. James Berkley, died in the lifetime of the said Thomas Cromwell, leaving issue Martha Virginia Berkley, one of the parties complainant to this your orators' bill; and

the said Thomas Cromwell had issue Lavinia, who intermarried with Dr. Jeremiah Berry, of the State of Missouri, who died in the lifetime of the said Thomas, leaving her husband, the said Jeremiah, in full life, and now one of the parties complainant to this your orators' bill, and issue one son, Thomas Cromwell Berry, a citizen of the State of Missouri, and one of the parties to this your orators' bill.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best judgment of their several and respective knowledge, remembrance, information and belief, full, true and perfect answer make to such of the several interrogatories herein after numbered and set forth, as by note hereunder written, they are respectively required to answer, that is to say:

1. Whether the mortgage hereto annexed and filed as an exhibit, marked "A," is a true exemplification of the mortgage of the said Thomas, as set out in this bill?

2. Whether the exhibit marked "B" is a true exemplification of the record of the scire facias sur mortgage, as set forth in this bill?

3. Whether the original paper signed by Thomas Cromwell, wherein he acknowledges that he had confessed judgment in favor of the Bank of Pittsburgh, is any portion of it in the handwriting of the said Thomas, except his signature, and whether the body of the said writing is not in the handwriting of the attorney of the Bank of Pittsburgh? State fully and at large all you know on the subject of this interrogatory.

4. What has been the annual rents of the mortgaged premises, from 1820, at the Bank of Pittsburgh took possession, until now?

5. State whether Mr. Bradford was attorney for the Bank of Pittsburgh, and acting for her and in her behalf, at the time he made his respective motions to amend, as herein after set forth?

6. State each and every one of the respondents, whether they or either of them claim any portion of said mortgaged land in fee by title through the Bank of Pittsburgh, as mortgagee of the said Thomas Cromwell; if yea, how much; and describe the same fully and at large.

7. State whether the pedigree and alliance of complainants, showing their connection and claim under Thomas Cromwell, is justly hereby set out.

To the end, therefore, that full justice may be done in the premises, your orators pray your honorable court that a subpœna may issue out of your honorable court, directed to said respondents, commanding that each and every of them to be and appear before your honorable court, on a day certain to be therein named, under the penalty that may ensue, to answer according to the rules of your honorable court; and that your honorable court would order, direct and decree an account of the rents, issues and profits of said mortgaged premises to be taken by one of the masters of your honorable court, during the time said respondents were in possession thereof, from November, in the year of our Lord one thousand eight hundred and twenty, to the date of said

report, charging in said account the mortgage, debts and interest, and debiting same with annual receipts of rents received, or which might have been received, whilst said mortgagees and their tenants were in possession, and after satisfying said mortgage, debt and interest, carry any surplus that might have been received as aforesaid to the credit of the said mortgagor, and those claiming under him, and decree payment thereof according to the principles of equity and the rules of your honorable court; and further, that if, on said account being taken as aforesaid, a balance should be due said Bank of Pittsburgh, on account of the mortgage, debt and interest as aforesaid, that then, upon payment thereof to the said Bank of Pittsburgh, at a day and place certain to be named by your honorable court, the said respondents be decreed to surrender up, satisfy and cancel said mortgage, in the same manner as if the same had never existed; and if by the report of the master, as aforesaid, it should appear that the said mortgage, debt and interest was fully satisfied, or might have been satisfied, with the reception of the rents, issues and profits of said mortgaged premises, that the said respondents be decreed to reconvey the same to your orators, free and clear from the incumbrances of said mortgage; and that your honorable court would decree in the premises as to justice and equity belong. And they will pray, &c.

T. J. FOX ALDEN, *Att'y for compl'ts.*

N. B.—The respondents in this case are respectively required to answer interrogatories numbered from 1 to 7 inclusive.

T. J. FOX ALDEN, *Att'y for complainants.*

April 14, 1853.

To H. SPROUL, Esq., Clerk of the circuit court
of United States for western district of Pennsylvania:

Issue separate subpœnas on within bill of equity, returnable on first rule day next ensuing, with *with* directions to serve the same on the cashier of the Bank of Pittsburgh, John Snyder, esq., and on Thomas Fairman, esq., one of the directors of the Mount Union Cemetery, and on each of the other defendants named in the bill.

T. J. FOX ALDEN, *Sol'r for compl'ts.*

April 14, 1853.

Exhibit A, referred to in the bill.

This indenture, made the 13th day of May, A. D. 1819, between Thomas Cromwell, of the city of Pittsburgh, merchant, of the one part, and the Bank of Pittsburgh, of the other part, witnesseth:

That Thomas Cromwell, in and by a certain writing obligatory under his hand and seal, bearing date herewith, standeth bound and indebted to the said Bank of Pittsburgh, in the debt or sum of twenty thousand one hundred and thirty dollars, to be paid on demand, with lawful interest from the date of the said writing, as by relation thereto being had more fully appears:

Now, this indenture witnesseth, that the said Thomas Cromwell, for

and in consideration of the said debt or sum of twenty thousand one hundred and thirty dollars, for the better securing the payment thereof, with the interest thereon to the Bank of Pittsburgh aforesaid, its successors or assigns, and for and in consideration of the sum of one dollar unto the said Thomas Cromwell in hand paid by the said Bank, hath granted, bargained and sold, released and confirmed, unto the Bank of Pittsburgh aforesaid, its successors and assigns, the following certain lots or pieces of ground, all situate in the county of Allegheny, and State of Pennsylvania, to wit:

Two adjoining lots of ground in the city of Pittsburgh, Nos. one hundred and twenty-one and one hundred and twenty-two, bounded by Liberty street, an alley, Penn street; lot No. 120, conveyed by David Evans to the said Thomas Cromwell, and now in the occupation, by lease, of Richard Bowen, and on which at the corner of the alley is erected a two-story brick dwelling-house and other buildings; and also the following out-lots of the town of Allegheny, in Ross township, in the reserved tract opposite Pittsburgh, to wit: Nos, 16, 17, 235, 236, 237, 238, 244, 245, 246, 248, 249, 250, 251, 257, 258, 259, and 270, part of them binding on the Ohio river, and now in the occupation of the said Thomas Cromwell, containing in the whole one hundred and seventy acres, more or less, together with all the appurtenances thereunto belonging:

To have and to hold the said two contiguous lots in the said city of Pittsburgh, and the said described seventeen out-lots, with the appurtenances, unto the said Bank of Pittsburgh, its successors and assigns, to the only proper use, benefit, and behoof of the Bank of Pittsburgh aforesaid, its successors and assigns, forever: Provided always, nevertheless, that if the said Thomas Cromwell, his heirs, executors, administrators, shall and do well and truly pay or cause to be paid unto the said Bank of Pittsburgh, its successors or assigns, the aforesaid debt or sum of $20,130, at the time herein before mentioned and appointed for the payment thereof, together with lawful interest for the same, according to the said writing obligatory, without fraud or further delay, and without any defalcation or abatement whatsoever, that then and from thenceforth, as well this present indenture and the estate hereby granted, as the said writing obligatory, shall cease and become void, any thing herein before mentioned to the contrary notwithstanding.

Sealed and delivered on the day and year first above written, in presence of Wm. Wilkins.

THOMAS CROMWELL. [SEAL.]

Received of the Bank of Pittsburgh the sum of one dollar, the consideration money before mentioned, May 13th, 1819.

Witness—WILLIAM WILKINS.

PENNSYLVANIA, *City of Pittsburgh.*

Before me, the subscriber, one of the aldermen of the said city of Pittsburgh, personally appeared Thomas Cromwell, the within grantor, and acknowledged the within indenture to be his act and deed, and desired the same to be recorded as such.

Witness my hand and seal, this *this* 13th day of May, A. D. 1819.

Recorded May 31st, 1819. THOMAS ENOCH. [SEAL.]

Exhibit "A."

ALLEGHENY COUNTY, *ss.*

I, Samuel Fahnestock, recorder of deeds, &c., in and for said county, do hereby certify, that the foregoing is a true and correct copy of a mortgage remaining of record in my office, recorded May 31st, 1819, in mortgage book vol. 1, page 55.

[SEAL.] Given under my hand and seal of office, at Pittsburgh, this 5th day of April, A. D. 1853.

SAMUEL FAHNESTOCK, *Recorder.*

Exhibit "B."

Among the records and proceedings in the court of common pleas, in and for the county of Allegheny, Commonwealth of Pennsylvania, of August term, 1820, No. 136, it is thus enrolled:

Docket entries.

THE BANK OF PITTSBURGH vs. THOMAS CROMWELL. } WILKINS.

Scire facias sur mortgage, recorded in book "A," page 55. Served. So answers Morgan Neville, sheriff, $1 25, December 1st, 1835. Pro. Pentland, $1 82. Lev. fa. No. 89, November term, 1820.

And now, to wit, December 1st, 1835, on motion of Mr. Bradford, rule to show cause on the second Monday of this month, why the record in this case should not be amended by the entry on the docket as of September 13, 1820, of the judgment which appears among the papers in the case. Same day granted, December 14, 1835. Rule made absolute. Opinion of the court filed.

September 13, 1820, judgment confessed, per writing filed, signed by defendant, for the sum of twenty-one thousand seven hundred and forty dollars and forty cents, besides cost of suit, a release of all errors, without stay of execution, and that the plaintiff shall have execution by levari facias, by November term, 1820.

H. H. PETERSON, *Pro.*

Præcipe for sci. fa. Filed June 9, 1820.

ALLEGHENY COUNTY, *ss.*

THE BANK OF PITTSBURGH vs. THOMAS CROMWELL. }

Issue scire facias on mortgage to August, 1820.

WILLIAM WILKINS, *Pr. Qr., June 7, 1820.*

E. PENTLAND, *Pro.*

ALLEGHENY COUNTY, *ss.*

[L. S.] The Commonwealth of Pennsylvania, to the sheriff of Allegheny county, greeting:

Whereas Thomas Cromwell, late of your county, yeoman, by a certain indenture made at the county aforesaid, the thirteenth day of May, in the year of our Lord one thousand eight hundred and nineteen, between the said Thomas Cromwell, by the name of Thomas Cromwell, of the city of Pittsburgh, in the county of Allegheny, of the one part, and the Bank of Pittsburgh, by the name of The Bank of Pittsburgh, of the same place, of the other part, for and in consideration of a certain debt or sum of twenty thousand one hundred and thirty dollars; and for the better securing the payment thereof, with its interest, unto the said Bank of Pittsburgh, its successors or assigns, in discharge of a certain obligation, under the hand and seal of the said Thomas Cromwell, bearing even with the said indenture, whereby the said Thomas Cromwell stood bound unto the said Bank of Pittsburgh in the sum of twenty thousand one hundred and thirty dollars, to be paid on demand, together with lawful interest from the date of the said obligation; and for and in consideration of the further sum of one dollar, to him in hand well and truly paid by the said Bank of Pittsburgh, the said Thomas Cromwell did grant, bargain, sell, release and confirm, unto the said Bank of Pittsburgh, its successors or assigns, the following certain lots or pieces of ground, all situate, lying, and being in the county of Allegheny, to wit: two adjoining lots of ground in the city of Pittsburgh, Nos. 121 and 122, bounded by Liberty street, an alley, Penn street, and lot No. 120, conveyed by David Evans to the said Thomas Cromwell, and now in the occupation by lease of Richard Bowen, and on which, at the corner of the alley, are erected a two-story brick dwelling-house, and other buildings.

And also the following out-lots of the town of Allegheny, in Ross township, and on the reserved tract opposite Pittsburgh, to wit: Nos. 16, 17, 235, 236, 237, 238, 244, 245, 246, 248, 249, 250, 251, 257, 258, 259, and 270, part of them binding on the Ohio river, and now in the occupation of the said Thomas Cromwell, containing in the whole one hundred and seventy acres, more or less, together with all the appurtenances thereto belonging; to have and to hold the said two contiguous lots in the said city of Pittsburgh, and the said described seventeen out-lots, with the appurtenances, unto the said Bank of Pittsburgh, its successors and assigns, to the only proper use, benefit, and behoof of the Bank of Pittsburgh aforesaid, its successors and assigns, forever.

And whereas, by the same indenture, it is likewise provided and agreed that, if the said Thomas Cromwell, his heirs, executors, and administrators, shall well and truly pay or cause to be paid unto the said Bank of Pittsburgh, its successors or assigns, the aforesaid debt or sum of twenty thousand one hundred and thirty dollars, at the aforesaid time appointed for the payment thereof, according to the tenor and

effect of the said recited obligation, as by the same indenture in our county court of common pleas, for the said county of Allegheny, before our judges at Pittsburgh, being shown, the date whereof is the day and year aforesaid, manifestly appears. And the aforesaid debt or sum of twenty thousand one hundred and thirty dollars, with the interest, or any part thereof, was not paid on demand, nor according to the tenor and effect of the said indenture or the said obligation, and still does remain unpaid, as by the information of the said Bank of Pittsburgh we have received, it hath besought us to provide for it a proper remedy in that behalf:

And because we are willing that what is right in that behalf should be done, therefore we command you, that by honest and lawful men of your bailiwick, you make known to the said Thomas Cromwell, who now holds and is possessed of the lands and tenements aforesaid, that he be and appear before our judges at Pittsburgh, at our county court of common pleas, there to be held for the county aforesaid, the first Monday of August next, to show, if anything for himself he has to or can say, why the said lots with the appurtenances should not be seized and taken in execution to satisfy the debt and interest aforesaid, if to him it shall seem expedient; and further to do and receive what our said court in that behalf consider.

And have you then and there the names of those by whom you shall so make known to him, and this writ.

Witness the honorable Samuel Roberts, president of our said court, at Pittsburgh, the sixth day of May, in the year of our Lord one thousand eight hundred and twenty.

Attest:

Endorsement on the above writ.

I accept service of this writ.

THOMAS CROMWELL.

Endorsement on the envelope of the above scire facias.

No. 136, August term, 1820.

THE BANK OF PITTSBURGH
vs.
THOMAS CROMWELL. } Scire facias sur mortgage.

Recorded in book "A," page 55.

Served on Thomas Cromwell, the defendant and terre-tenant, agreeably to the act of assembly in such case made and provided. So answers Morgan Neville, sheriff. Costs of Sheriff Neville—$1 25.

ALLEGHENY COUNTY, *ss.*

No. 136, of August term, 1820.

THE BANK OF PITTSBURGH
vs.
THOMAS CROMWELL. } Scire facias sur mortgage.

In my proper person I this day appeared before the prothonotary, in

his office, and confessed judgment to the plaintiff for $21,740 40, besides costs, with a release of all errors, without stay of execution; and that the plaintiff shall have execution by levari facias to November term, 1820.

THOMAS CROMWELL.

Endorsed: Filed September 13, 1820.

WM. PENTLAND.

Paper endorsed: No. 136, August term, 1820.—Filed December 14, 1835.

THE BANK OF PITTSBURGH
vs.
THOMAS CROMWELL.

In the court of common pleas of Allegheny county, No. 136, August term, 1820.

THE BANK OF PITTSBURGH
vs.
THOMAS CROMWELL.

"And now, to wit, December 1st, 1835, on motion of Mr. Bradford, rule to show cause why the record in this case should not be amended by the entry on the docket as of September 13, 1820, of the judgment which appears among the papers filed in this case."

It is apparent on the face of the record in this case, an exemplification of which has been furnished to the court, that the amendment now desired is rendered necessary, in consequence of the neglect or omission of the prothonotary to enter upon the appearance docket a judgment confessed by the defendant in person, on the 13th September, 1820, which confession was contained in a slip of paper signed by the defendant, and filed with the papers in the case, but never noticed in the docket entries.

The doctrine of amendments has, in modern practice in Pennsylvania, been applied on very liberal principles; the exercise of the power now invoked, generally speaking, tends very much to the promotion of justice. To deny the amendment now prayed for might be productive of consequences alike as unjust as they would be extensively injurious. There is here something to amend by, and the effect of the amendment is, to make that appear upon the docket which the prothonotary ought to have made appear on the day that the confession of judgment by the defendant was filed.

The case of Murray et al. vs. Cooper, for the use of Taggart, 6 S. & R. 126, argues strongly in favor of the present rule. In that case, Chief Justice Tilghman, in delivering the opinion of the court, says: "But, independently of the statute, (17 Car. 2, ch. 8,) the court has power, in order to do justice, to enter judgment at their discretion, as of a past time when it ought to have been entered. It was so deter-

mined in the case of Griffiths vs. Ogle, 1st Benn. 172." "Perhaps," continues the chief justice, "it was through the fault of the prothonotary that it was not entered."

So far as the parties to the record are concerned, it is no more than justice to consider it as entered at the time when they thought it was, and intended it should be entered. As to third parties, they are not to be injured. The entry of the judgment of the past time will not be permitted to affect their rights.

Rule made absolute.

Among the records of the court of common pleas of Allegheny county are the following, to wit:

No. 136 of August term, 1820.

BANK OF PITTSBURGH
vs.
THOMAS CROMWELL.

And now, to wit, December 1, 1835, on motion of Mr. Bradford, rule to show cause on the 2nd Monday of this month, why the record in this case should not be amended by the entry on the docket as of September 13th, 1820, of the judgment which appears among the papers filed in the case.

In witness whereof I have hereunto set my hand and the seal of the said court, this 7th day of December, A. D. 1835.

[L. S.]

H. H. PETERSON, *Pro.*

Put up December 2nd, 1835.

W. McCANDLESS, JR.

Endorsed: No. 136, November, 1820. Filed Feb. 11, 1836.

Among the records of the district court of Allegheny county are found the following, to wit:

No. 136, August, 1820.

BANK OF PITTSBURGH
vs.
THOMAS CROMWELL.

And now, to wit, Dec. 1, 1835, on motion of Mr. Bradford, rule to show cause on the second Monday of this month, why the record in this case should not be amended by the entry on the docket as of September 13, 1820, of the judgment which appears among the papers filed in this case.

Witness my hand and the seal of the said court, this 7th day of December, A. D. 1835.

[L. S.]

H. H. PETERSON, *Pro.*

Endorsed: No. 136, Nov., 1820. Filed Dec. 14, 1835.
Served on me, William McKee being absent.

SARAH McKEE.

Execution docket entries.

WILKINS.

BANK OF PITTSBURGH vs. THOMAS CROMWELL. } 89. Levari Facias, No. 136, August, 1820.

(For return, see endorsement on writ.)

Debt - - - - - - -	$21,740 40
Interest from 13th May, 1820.	
Attorney - - - - - -	4 00
Sh'ff Neville - - - - - -	1 25
Pro. Pentland - - - - - -	3 82
Sheriff Neville - - - - - -	11 50
Crier, deed, recording and acknowledging - -	5 75

And now, to wit, March 19th, 1836, on motion of Mr. Bradford, it is ordered that this writ of levari facias be amended by inserting the 13th day of September, A. D. 1820, instead of the 13th day of May, of the same year, so as to conform to the judgment.

Attest: JAMES LOGAN, *Prothonotary.*

ALLEGHENY COUNTY, *ss:*

No. 136, August term, 1820.

BANK OF PITTSBURGH vs. THOMAS CROMWELL. } Scire facias sur mortgage and judgment.

Issue levari facias, returnable to Nov. term, 1820.

E. PENTLAND, *Pro.* WM. WILKINS, *Pr. Qr.*

Endorsed on præcipe: No. 89, Nov. term, 1820.
Bank of Pittsburgh vs. Thomas Cromwell.
Issued September 13th, 1820.

W. WILKINS.

ALLEGHENY COUNTY, *ss:*

[SEAL.] The Commonwealth of Pennsylvania, to the sheriff of Allegheny county, greeting:

We command you, that without any other writ from us, of the lands and tenements which were of Thomas Cromwell, late of your county, yeoman, otherwise called Thomas Cromwell of the city of Pittsburgh, to wit: Of the following certain lots or pieces of ground, all situate, lying and *and* being in the county of Allegheny, viz: two adjoining lots of ground in the city of Pittsburgh, Nos. 121 & 122, bounded by Liberty street, an alley, Penn street, and lot No. 120, conveyed by David Evans to the said Thomas Cromwell, and now in the occupa-

tion, by lease, of Richard Bowen, and on which are erected a two-story brick dwelling-house and other buildings.

And also the following out-lots of the town of Allegheny, in Ross township, and on the reserved tract opposite Pittsburgh, to wit: Nos. 16, 17, 235, 236, 237, 238, 244, 245, 246, 248, 249, 250, 251, 258, 259, and 270, part of them binding on the Ohio river, and now in the occupation of the said Thomas Cromwell, containing in the whole one hundred and seventy acres more or less, together with the hereditaments and appurtenances; in your bailiwick, you cause to be levied as well a certain debt of twenty-one thousand seven hundred and forty dollars and forty cents, with the lawful interest thereof from the 13th day of (May*) September, A. D. 1820, as also the sum of nine dollars and seven cents for costs, which said sum of $21,740 40, with the interest and costs aforesaid, the Bank of Pittsburgh lately in our county court of common pleas, before our judges at Pittsburgh, to wit: on the 13th day of (May*) September last past, by the consideration of the same court, recovered against the said Thomas Cromwell, of the said lots in the city of Pittsburgh, and out-lots of the town of Allegheny, in Ross township, &c., with the appurtenances, to be levied by the default of the said Thomas Cromwell in not paying the said sum of $21,740 40, with the lawful interest thereof, at the day and time when the same ought to have been paid, according to the form and effect of an act of assembly, of the State of Pennsylvania, in such case made and provided.

And have you these moneys before our judges at Pittsburgh, at our county court of common pleas, there to be held the first Monday of November next, to render unto the said Bank of Pittsburgh for its debt, interest and damages aforesaid, whereof the said Thomas Cromwell is convict, as appears of record, &c. And have you there then this writ.

Witness the Hon. Samuel Roberts, president of our said court at Pittsburgh, the 12th day of August, A. D. 1820.

E. PENTLAND, *Prothonotary.*

Endorsement on this writ.

No. 89, November term, 1820.

BANK OF PITTSBURGH vs. THOMAS CROMWELL. } Levari facias, No. 136, August, 1820.

Debt - - - - - - - -	$21,740 40
Interest from 13th May, 1820.	
Attorney - - - - - -	$4 00
Sheriff Neville - - - - - -	12 75
Pro. Pentland - - - - - -	3 82
Crier, deed, recording and acknowledging - -	5 75

*March 19th, 1836; the word May altered to September, in pursuance of an order of court, made this day. See execution docket, No. 8.

JAMES LOGAN, *Pro.*

I, Thomas Cromwell, the within defendant and mortgagor, acknowledge to have received from Sheriff Neville due and regular notice of the time and place of holding an inquisition and appraisement upon the within described property, and I do hereby release all errors touching the premises.

September 18, 1820. THOMAS CROMWELL.

Inquisition report.

Inquisition indented and taken the 22d day of September, A. D. 1820, at the house of George Beale, in the city of Pittsburgh, county of Allegheny, before Morgan Neville, high sheriff of said county, by the oaths and affirmations of Magnus M. Murray, Thomas Enoch, John Irwin, James Pentland, E. Denny, John Donthilt, John Davis, John Wainright, William Diehl, Andrew Willock, William Eichbaum and Lewis Peterson, twelve good and lawful men, who, upon their oaths aforesaid, do appraise and value the following property, viz: Two adjoining lots in the city of Pittsburgh, Nos. 121 and 122, bounded by Liberty street, an alley, Penn street, and by lot No. 120, as described in the within writ; and also the following property, to wit, the following out-lots in the town of Allegheny, in Ross township, and on the reserved tract opposite Pittsburgh, viz., 16, 17, 235, 236, 237, 238, 244, 245, 246, 248, 249, 250, 251, 257, 258, 259 and 270, part of them binding on the Ohio river, and now in the occupation of the said Thomas Cromwell, containing in the whole 170 acres more or less, seized and taken in execution by virtue of a writ of levari facias, as the property of Thomas Cromwell, at the suit of the Bank of Pittsburgh, at the following sums, viz: the out-lots in the reserve tract, Nos. 16, 17, 235, 236, 237, 238, 244, 245, 246, 248, 249, 250, 251, 257, 258, 259 and 270, are reasonably worth the sum of $10,200; and that lot No. 122, in the city of Pittsburgh, with the appurtenances, is reasonably worth $7,500; and that lot No. 121 is reasonably worth $2,000.

MORGAN NEVILLE, *Sheriff.* [SEAL.]
MAGNUS M. MURRAY, [SEAL.]
THOMAS ENOCH, [SEAL.]
JOHN IRWIN, [SEAL.]
JAMES PENTLAND, [SEAL.]
E. DENNY, [SEAL.]
JOHN DONTHILT, [SEAL]
JOHN DAVIS, [SEAL.]
JOHN WAINRIGHT, [SEAL.]
WM. DIEHL, [SEAL.]
ANDREW WILLIOCK, [SEAL.]
WM. EICHBAUM, [SEAL.]
LEWIS PETERSON. [SEAL.]

Sheriff's return endorsed on Inquisition report.

By virtue of this writ, I exposed the premises within named to pub-

lic sale after regular notice, and sold the same to the Bank of Pittsburgh, as follows, said Bank being the highest and best bidder, viz: the lots in the reserved tract containing 170 acres, for $6,805 00; lot No. 122, in Pittsburgh, for $5,005 00; and lot No. 121, in Pittsburgh, for $1,350 00; sold on the 28th September, 1820.

So answers MORGAN NEVILLE, *Sheriff.*

BANK OF PITTSBURGH
vs.
THOMAS CROMWELL. } Levari facias, No. 89, November term, 1820.

And now, to wit, March 16, 1836, on motion of Mr. Bradford, it is ordered that this writ of levari facias be amended by inserting the 13th day of September, instead of the 13th day of May of the same year, so as to conform to the judgment.

Endorsed: No. 89, November term, 1820.

March 19, 1836, the within order granted by the court.

T. B. DALLAS.

Filed, March 19, 1836. J. L., *Pro.*

COMMONWEALTH OF PENNSYLVANIA,
Allegheny county, ss.

[SEAL.] I, Edward Campbell, jr., prothonotary of the court of common pleas of said county, do hereby certify, that the foregoing is a full and correct exemplification of the whole record of the case therein stated, wherein the Bank of Pittsburgh is plaintiff, and Thomas Cromwell is defendant, as the same remains of record in said court, at No. 136, August term, A. D. 1820.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Pittsburgh, this 14th day of March, A. D. 1853.

EDWARD CAMPBELL, JR.,
Prothonotary.

CIRCUIT COURT OF THE UNITED STATES,
Western district of Pennsylvania.

No. 5, November term, 1853.

The several answer of the Bank of Pittsburgh to the bill of complaint exhibited and filed in said court by William J. Slicer, a citizen of the State of Maryland, and others, and now pending therein against said Bank of Pittsburgh, respondent, and others.

The said Bank of Pittsburgh, reserving the full benefit and advantage of all exception to the manifold errors and defects of complainant's bill of complaint, for answer to so much thereof as is material to be answered, saith:

First. In reply to the specific interrogatories required to be answered, admits that the mortgage annexed to complainants' bill, and filed therewith as an exhibit marked "A," mentioned in the first interrogatory, is a true exemplification of the mortgage of Thomas Cromwell mentioned in complainants' bill.

In answer to the second interrogatory respondent admits, and expresses the belief, that the exhibit marked "B," attached to complainants' bill, is a true exemplification of the record of the scire facias sur mortgage, as set forth in said bill.

In answer to the third specific interrogatory the respondent saith, that the Bank of Pittsburgh, the mortgagee, sued out a scire facias against said Thomas Cromwell, the mortgagor, agreeably to the laws of Pennsylvania, No. 136, of August term, 1820, for the purpose of foreclosing the mortgage, dated May 13th, 1819, given to secure the payment *to the payment* to the said bank, on demand, the sum of $20,130 with interest; the said writ of scire facias was duly returned by the sheriff—"Served on Thomas Cromwell, the defendant, agreeably to the act of assembly in such case made and provided;" the acknowledgment of service was also endorsed and signed by the said Thomas Cromwell.

After the return of the said writ of scire facias as above stated, the said Thomas Cromwell, accompanied by the attorney of the Bank of Pittsburgh, the mortgagee, appeared in the prothonotary's office, and to the prothonotary confessed judgment in favor of the said bank, and singned the following paper, written by that attorney in acknowledgment and confirmation of that act.

ALLEGHENY COUNTY, *sct.*

No. 136, of August term, 1820.

THE BANK OF PITTSBURGH
vs.
THOMAS CROMWELL. } Scire facias sur mortgage.

In my proper presence, I this day appeared before the prothonotary in his office, and confessed judgment to the plaintiff for $21,740 40, besides costs, with a release of all errors, without stay of execution, and that the plaintiff shall have execution by levari facias to November term, 1820.

"THOMAS CROMWELL."

This the said paper, and acknowledgment that judgment had been confessed, is without date; but it is endorsed by the acting clerk in the prothonotary's office, "Filed September 13th, 1820," and was so filed; and further, it is folded and endorsed and filed of record in the office with other papers of the case. Immediately after the above confession of judgment and on the same day, the same attorney for the plaintiff gave his præcipe for the levari facias, in the following words and form:

ALLEGHENY COUNTY, *sct.*

No. 136, August term, 1820.

THE BANK OF PITTSBURGH vs. THOMAS CROMWELL. } Scire facias sur mortgage and judgment.

"Issue levari facias, returnable to November term, 1820."

WM. WILKINS, *Pr. Qr.*

E. PENTLAND, *Prothonotary.*

This præcipe was endorsed by the clerk thus:

"No. 89, November, 1820, Bank of Pittsburgh vs. Thomas Cromwell." Præcipe issued September 13, 1820. (WILKINS.)

And the respondent believes and charges the fact to be, that the judgment stated in the foregoing original paper (signed by the said Thomas Cromwell) to have been confessed by the said Thomas Cromwell before the prothonotary of the court of common pleas of Allegheny county, and in his office, was on the said 13th day of September, 1820, entered and docketed by the said prothonotary in due and regular form of law, on the rough appearance docket of said court, wherein it was usual and customary to enter judgments, and that the said rough docket of said court was long since lost, and cannot after diligent search be found.

In answer to the fourth specific interrogatory the respondent saith, that having purchased the mortgaged premises mentioned in complainants bill for a fair, full, and bona fide consideration, at sheriff's sale upon a levari facias regularly issued upon a valid judgment in favor of said bank against said Thomas Cromwell in his lifetime, (all which appears from the exhibits filed with complainants' bill as part thereof, entered in the year 1820,) adversely into possession of said mortgaged premises, not as mortgagee, but after the foreclosure of the said mortgage, as owner thereof, in virtue and in pursuance of the premises aforesaid, and a conveyance by the sheriff of the same; and having long since, to wit, previous to the year 1829 (having commenced their sales and conveyances in the year 1822) conveyed the same to sundry bona fide purchasers for fair and valuable consideration, without general warranty, and for a sum less than $28,000, and ceased to have any interest in or connection with said mortgaged premises, the respondent submits to the court, and insists, that said bank is in no way bound in law or equity to give any other or further answer to said fourth interrogatory.

In answer to the fifth interrogatory, respondent claims that complaints are estopped and concluded by the records contained in the exhibits filed with their bill as a part thereof, from alleging that no judgment existed that warranted the issuing of said levari facias, on and by virtue of which said mortgaged premises were sold to said bank, which, as the respondent claims, rendered said fifth interrogatory wholly irrelevant and immaterial, more especially as the amend-

ment of the record was the act of the court having jurisdiction and competent authority over the subject matter. It is immaterial upon whose motion, whether the gentleman named in the interrogatory was the attorney of the bank or the attorney of the vendees or assignees of the said bank, that the motion to amend the record was made; but in point of fact he was not the attorney of the said Bank of Pittsburgh, and the said bank, at the time, had no knowledge of the proceedings, nor for a long time afterwards, to wit, not until the filing of the present bill.

In answer to the seventh interrogatory, respondent can neither admit or deny the allegation that the pedigree and alliance of complainant showing their connection and claim under Thomas Cromwell is justly set out in complainants' bill, having no knowledge or information touching the premises except what is derived from the allegation contained in said bill.

Having answered the foregoing interrogatories, respondent proceeds to reply to the general allegations contained in the complainants' bill, and exhibit such grounds of defence as are deemed proper to be stated on the present occasion.

The respondent admits the seizin of Thomas Cromwell of the mortgaged premises, and the execution of said mortgage as alleged. Also, that the said bank did, on the ninth (9) day of June, 1820, cause a scire facias to be issued upon said mortgage out of the court of common pleas of Allegheny county, and admits and alleges that said court had full and complete jurisdiction of the cause; that service of said scire facias was accepted by said Thomas Cromwell, on the back thereof; that such service was duly returned by the sheriff of said Allegheny county, according to law. The respondent claims that the complainants are, by their own showing, estopped and concluded from alleging that said bank caused a writ of levari facias to be issued out of said court of common pleas, and said mortgaged premises sold thereon without any judgment being entered on said scire facias; but on the other hand, respondent claims that said levari facias was fully warranted by a valid judgment of said court, which the complainants are, upon their own allegations, concluded from controverting. The respondent believes that the paper set forth in the complainants' bill purporting to be signed by Thomas Cromwell, and endorsed—filed September 13, 1820—is correctly copied from the original record in said court of common pleas.

The respondent claims that said paper is, upon the complainants' own showing, clear and conclusive evidence that said Thomas Cromwell did, as heretofore alleged, on the 13th day of September, 1820, appear before the prothonotary of said court of common pleas, in his office, and confess a judgment in said proceeding by scire facias sur mortgage, in favor of said Bank of Pittsburgh, for the sum of $21,740 40, besides costs, and a release of all errors; and that, by such proceeding, the said Thomas Cromwell admitted that he was justly indebted to the said Bank of Pittsburgh, by said mortgage, in the sum aforesaid. And the respondent claims and insists that the foregoing premises clearly show that said bank was justly, equitably, and in good conscience en-

titled to the appropriate remedies and process of the law to secure satisfaction, by the sale of said mortgaged premises, of the sum of $21,740 40, so admitted by said Cromwell to be so due as aforesaid, and for which he confessed judgment as aforesaid; and that said bank, and those claiming under it, have been and are justly entitled to protection in the enjoyment of the said mortgaged premises purchased by said Bank, at public sale or vendue, on said levari facias, for full, fair, and bona fide consideration.

The respondent admits and claims, that said bank and those claiming under it have been in adverse and continuous possession and enjoyment of all of said mortgaged premises from the time of the said sale on said levari facias, until the filing of the complainants' bill, entering, claiming, and holding, and enjoying the same adversely and in utter hostility to any right, title, or interest of said Thomas Cromwell, or those claiming under him, during all the period aforesaid, without any admission or concession whatever of any right by said Thomas Cromwell, or those claiming under him, to said mortgaged premises, or any right resulting from said mortgage, or that the said mortgage was for any purpose in existence, the said bank having, in due course of law, foreclosed the same, and having sold and conveyed all of said mortgaged premises to bona fide purchasers for a full, bona fide, and valuable consideration previous to the year 1829.

The respondent utterly denies all liability now, or any time, to account either to the said Thomas Cromwell or those claiming under him, for any rents, issues, or profits received, or that might have been received, by said bank from said mortgaged premises or any part thereof. The respondent confidently claims and insists that the proceedings and purchases before mentioned are in every respect valid, legal, and binding, and that an adverse, continuous, and hostile possession and enjoyment, for a period exceeding thirty-two years, without any recognition or admission of any right, title, claim, or interest, on the part of said Thomas Cromwell or those claiming under him—neither of whom, during any part of that period of time, were under any legal disability—are, and in equity and justice ought to be by the court, held and pronounced a full, complete, and perpetual bar and defence for the said bank against all the rights, equities, and claims of the said complainants. And the respondent further alleges that said bank, and those claiming under it, have held such possession and enjoyment, as is hereinbefore described, of said mortgaged premises for a period exceeding thirty-two years, without any let, hindrance, or objection by said Thomas Cromwell or those claiming under him; and that the said Thomas Cromwell and those claiming under him have, during the period aforesaid, permitted said bank, and those claiming under it, to hold such possession of said mortgaged premises without objection; that neither the said bank or those claiming under it have, during all the period aforesaid, accounted either with the said Thomas Cromwell, or those claiming under him, for any rents, issues, or profits of said mortgaged premises; and that during all the period aforesaid, neither the said Thomas Crom-

well, (who died in the year 1850,) during his lifetime, nor those claiming under him since his death, have at any time asked, claimed, or demanded any account from said bank, or those claiming under said bank, of the rents, issues or profits of said mortgaged premises or any part thereof; and that said bank has not, during the period aforesaid, or at any time, in any manner, or by any act, admitted that it possessed the mortgaged title only to the said mortgaged premises. The respondent claims and insists that by the acts and proceedings aforesaid, said Thomas Cromwell, the mortgagor, wholly lost the right of redemption of said mortgaged premises; that no such right has vested in the complainants claiming under him, and that the title of said bank, and those claiming under it, to said mortgaged premises, has thereby become absolute in equity, and complete and perfect at law. And the said respondent insists that the premises aforesaid constitute, and ought to be by the court declared and pronounced, a complete and perfect bar to and defence against all the equities alleged and claimed in the complainants' bill.

And the respondent in further answer alleges, that there has been erected upon the said mortgaged premises, since the delivery of the aforesaid sheriff's deed, and the before mentioned adverse possession, a large, populous, and incorporated village, and other extensive, permanent, and valuable improvements made by the densely settled population.

The respondent cannot in this answer undertake to exhibit to the honorable court any estimate of the present vastly enhanced value of the estate in question, but will be content to make reference to the estimate to be found in the aforesaid bill in equity, and the printed communications upon the subject, made to the defendants in the bill by the counsel of the complainants.

And further respondent saith, that immediately after the sheriff's sale aforesaid, the said mortgaged premises, for the purpose of taxation, were assessed to the Bank of Pittsburgh.

The respondent emphatically denies any knowledge or belief, that by the laws of Pennsylvania, or any other State or country, the levari facias, levy and sale on the scire facias sur mortgage, mentioned in complainants' bill, are, or ought to be, held null and void; or that by operation of law the said Bank of Pittsburgh is only a mortgagee, and in by force of said mortgage; or that said scire facias, in the complainants' bill mentioned, under the circumstances alleged in complainants' bill and exhibits, is, or has been, at any time since the judgment of the 13th of September, 1820, and the said levari facias of the said date, a good, valid, subsisting, or any, recognition of said mortgage as in any manner existing, or effectual for any other purpose than furnishing a legitimate foundation for the judgment, execution, sale, and conveyance hereinbefore mentioned; or that said mortgage is not legally, completely, and finally foreclosed; or that the complainants, by the law of Pennsylvania, have any right to an account, or to redeem said

mortgaged premises; but on the other hand, the respondent claims directly the reverse to be true and correct.

The respondent having fully answered all the allegations and interrogatories contained in complainants' bill, prays to be hence dismissed, with payment to the respondent of costs expended.

In testimony whereof the respondent, the said Bank of Pittsburgh, hath hereunto affixed the corporate seal of said Bank, [Seal of the Bank of Pittsburgh.] and caused the name of the president of said Bank to be hereto subscribed, in his own proper handwriting, at Pittsburgh, this sixth day of May, anno Domini 1853.

JOHN GRAHAM,
Pres't of the Bank of Pittsburgh.

May 6th, 1853.

Copy of replication.

No. 1, November term, 1853. In the circuit court of U. S., for W. D. of Pa.

WILLIAM J. SLICER & als.
vs.
THE BANK OF PITTSBURGH. } In chancery.

The replication of William J. Slicer and als., complainants, to the separate answer of the Bank of Pittsburgh, defendant, to the bill of complaint of the above complainants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, say: That they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove, as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

T. J. FOX ALDEN,
Sol. pro complainants.

In the circuit court of the United States, for the western district of Pennsylvania.

No. 1, of November term, 1853.

WILLIAM J. SLICER et al.
vs.
THE BANK OF PITTSBURGH and others. } In equity.

And now, to wit, at the May term, A. D. 1853, of the said court, the

above cause came on for hearing, by consent of parties, upon bill, exhibits, answer, replication, and testimony. Upon hearing and consideration whereof, and the arguments of counsel, the court are of opinion that the equity of the cause is with the respondents; and it is now here ordered, adjudged, and decreed by the court, that the complainants' bill of complaint be dismissed, and that the complainants pay to the respondents their costs to be taxed.

Whereupon in open court the complainants pray an appeal, which is allowed on entering security in the sum of five hundred dollars.

(Signed) R. C. GRIER.

I, Henry Sproul, clerk of the circuit court of the United States, for the western district of Pennsylvania, do hereby certify that the security required by the court, under the above order or decree and appeal, has been entered and approved by the court.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of the said court, at Pittsburgh, this 9th day of September, A. D. 1853.

H. SPROUL, *Clerk.*

In the circuit court of the United States for the western district of Pennsylvania.

No. 1, of November T., 1853.

WILLIAM J. SLICER and others, heirs of Thomas Cromwell, deceased, vs. THE BANK OF PITTSBURGH. } In chancery.

And now, to wit, May 17, 1853, on motion, Thomas Kennedy, esq., appointed special commissioner to take testimony in the above cause.

UNITED STATES OF AMERICA,
Western district of Pennsylvania, sct.

I, Henry Sproul, clerk of the circuit court of the United States for the western district of Pennsylvania, do hereby certify that [SEAL.] Thomas Kennedy, esq., was duly appointed by the court, as above stated.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, this 18th day of May, A. D. 1853.

H. SPROUL, *Clerk.*

In the circuit court of the United States, for the western district of Pennsylvania.

No. 1, of November T., 1853.

WILLIAM J. SLICER and others, heirs of Thomas Cromwell, deceased, vs. THE BANK OF PITTSBURGH. } In chancery.

Depositions taken before me, Thomas Kennedy, commissioner, on the 18th day of May, 1853, between the hours of 10 o'clock a. m. and 2 o'clock p. m., at the office of the Hon. H. Hepburn, Fourth street, Pittsburgh, pursuant to the prefixed rule of court, to be read in evidence on behalf of the respondent in a certain action now pending in the aforesaid court, wherein William J. Slicer and others, heirs of Thomas Cromwell, deceased, are complainants, and the Bank of Pittsburgh is respondent.

R. B. Roberts, sworn. At the request of Judge Wilkins, solicitor for the respondents in this case, I proceeded, in company with Mr. Pentland, to the top of the court-house, and in a space surrounding the base of the cupola, on the southwestern side, or rather between it and the main building, amidst a quantity of old acts of assembly thrown negligently down into this space, I found a number of old papers, apparently belonging to the prothonotary's office, and a number of old rough appearance dockets. On this occasion I made a partial examination. I returned twice afterwards, took a candle, went down into this space, and made a most thorough search. I handled every paper and docket that was there. Some of these dockets went as far back as 1789, or further, and some came down as late as 1836; they were in a damaged condition, dirty, and apparently thrown away as useless. The docket of 1820 I could not find. The nearest I came to it was the one of 1821. I also made an examination in the prothonotary's office, and was unable to find it there. There were entries of judgments and confessions of judgments on these dockets.

Cross examined by Mr. Alden.

I noticed one judgment particularly, on a loose piece of paper, attached to one of the dockets by seal or wafer.

R. BIDDLE ROBERTS.

William Pentland, sworn. I was the clerk in the prothonotary's office in this county, in the year 1820, and for several years before that, say five or six years previous to 1820. Rough appearance dockets were used constantly in the office during all the time I was in the office; and these kind of dockets were in use and remaining in the office from the commencement of the county records during the whole time that I remained in the office. Such dockets were constantly and regu-

larly used, and were subsequently transcribed into a folio or large docket or dockets. Some of those large folio dockets were transcribed by myself. At the request of Judge Wilkins, I visited the prothonotary's office a month or six weeks ago; Mr. Roberts was present. While there, the papers on file in No. 136 of August term, 1820, in the case of the Bank of Pittsburgh against Thomas Cromwell, were shown to me. Among the papers was one signed Thomas Cromwell, stating as follows: "In my proper person I this day appeared before the prothonotary, in his office," &c., &c., which paper is set out in full on page 3, in plaintiff's paper book, (prout said paper,) which paper is endorsed in my handwriting in these words, "Filed September 13th, 1820; signed, William Pentland;" which signature is in my proper handwriting. The body of the paper is in the handwriting of Judge Wilkins, and the signature to it is in the handwriting of Thomas Cromwell. At this moment there is not a trace of the original transcription remaining on my mind. According to the practice in the office, the judgment, in the first instance, would have been entered on the rough appearance docket of 1820, of the No. and term to which it referred.

At the request of Judge Wilkins I accompanied Mr. Biddle Roberts to the court-house, and made search in company with him, in the place referred to by him in his deposition, for the rough docket of August term of 1820. While there we found some ten or a dozen of the rough dockets spoken of. Those of 1821 commencing with the January term *was* the nearest to the one searched for. The original entries of that docket commencing with 1821 are partly in my handwriting, with the exception of entries subsequently made. The dockets were kept in a body at the time, and laid past carefully in the same place by Mr. Roberts. In that docket of 1821 particularly, were the assignments of judgments and entries of satisfactions, and every kind of business incidental to the office. I mention one judgment to show the impression it made on my mind. It was a judgment of James Ross and John McDowell vs. Sam'l A. Roberts, executor of Samuel Roberts, the late Judge Roberts. The handwriting of the præcipe for the levari facias in the Cromwell case is in the handwriting of Judge Wilkins, and the endorsement on the back of it, the præcipe, is in my handwriting.

Cross examined by Mr. Alden.

The entries in rough appearance dockets were transcribed into large dockets, such as are in use now. Different clerks in the office acted as transcribing clerks. I do not know that these transcriptions were compared with the originals, but the person making the transcriptions would be very careful to have them correct. These transcriptions were made as often as opportunity would afford, at the expiration of the term, or, it might be, when the docket in use would be filled; but the practice was more immediately to transcribe at the expiration of the term. The rough docket of August term, 1820, was not found in the search made by Mr. Roberts and myself at the court-house. I have no knowledge where it is.

WM. PENTLAND.

John Snyder, sworn. I was acting as clerk in the Bank of Pittsburgh in 1820. In 1832 I became cashier. I knew Thomas Cromwell in 1820. He then resided in a house on the mortgaged premises where Manchester is now located. I recollect no other house on the tract where Mr. Cromwell resided, except the one he lived in, and a small log house on the lane which led up from the river. The Bank of Pittsburgh purchased this property of Cromwell's at sheriff's sale. (Looks at the deed produced from Morgan Neville, sheriff, to the Bank of Pittsburgh, marked "A," T. Kennedy. Prout said deed.) This is the deed by which the property was conveyed to the bank. The bank took possession of the property therein described, under this deed. Mr. Cromwell never disputed the title, that I remember. Cromwell resided on the land until Nov. 28th, 1821, and then I think it was unoccupied for some short time, and then rented by the Bank of Pittsburgh to Alexander Young, for one hundred and forty dollars, ($140.) From that time until the present, the bank and those claiming under it have held the possession of the property. The property was leased to Alexander Young on the 19th February, 1822. I saw Thomas Cromwell in Pittsburgh, I think, two or three years ago. He spent the evening with me at that time at my house. I understood he died shortly after at St. Louis. I was intimate with Mr. Cromwell, and lent him money to carry him away. I also received letters from him when he got to Farmingham, in Maryland. I never heard of any claim made by Mr. Cromwell on the Bank of Pittsburgh on account of this property, or anything connected with it, from the time he left here until the institution of these proceedings. I never heard his asking the bank for an account of any kind. No account was rendered to him by the bank since the sheriff's sale. The following is a list of the sales made by the Pittsburgh Bank of the property purchased at sheriff's sale, together with the amount for which each piece was sold: prout list hereunto annexed, and marked "B," T. Kennedy. This list contains the dates at which the contracts for the sales were made; but the deeds were not always executed until sometime afterwards. The amounts are the sums for which each piece was sold.

Mr. Bradford was first appointed attorney for the Bank of Pittsburgh on the 11th of June, 1836. The paper produced and marked "C," T. Kennedy, is a true copy of the resolution of the board under which he received his appointment; (prout said paper.)

All the conveyances made by the bank were deeds in the common form, with special warranty, conveying the fee simple to the purchaser. The deed now here produced from the Bank of Pittsburgh to John Burgess, dated 29th of August, 1823, and exhibited, is the general form in which these deeds were made.

There are now vast and permanent improvements on this property, such as founderies, churches, dwellings, and various manufactories, comprising a portion of the borough of Manchester. At the time of the sheriff's sale the lots in the city or Pittsburgh, part of the mortgaged premises, had one brick house of two stories on them.

They now have four three-story brick houses and seven two-story brick houses on them. These lots were in the possession of the bank or its vendees, from the date of the sheriff's sale up till the present time.

JOHN SNYDER.

I do hereby certify that R. Biddle Roberts, William Pentland and John Snyder, were by me severally sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions by them subscribed, as above set forth, were reduced to writing by me, at the time and place in the prefixed caption specified, in the presence of the counsel of the complainants and respondent.

THOMAS KENNEDY, *Commissioner.*

It is admitted that Thomas Cromwell died at St. Louis about three years ago, and that complainants are his heirs and representatives, as set out in complainants' bill.

T. J. FOX ALDEN, *Sol'r for compl't.*
WM. WILKINS, *For respondents.*

Date of resolutions to sell, and to whom, the property purchased at sheriff's sale of Thomas Cromwell's property.

1828, April 8 and 15,	to John Sampson, lots No. 16 and 17,	$5,000 00
1822, Aug. 6,	John H. Hopkins, lot 270 - -	600 00
1823, Aug. 26,	John Burgess, lot - - -	7,000 00
1826, May 30,	John Cameron, lot 251 - - -	1,100 00
1827, Oct. 16,	Jacob Snyder, lot 250 - - -	1,500 00
Dec. 31,	Jacob Gass, lots 235, 236 - -	500 00
1828, March 11,	Alex. Young, lots 249, 257 - -	2,400 00
" 18,	Jacob Snyder, lot 245 - - -	1,300 00
" 25,	Thos. Sample, lot 238 - - -	700 00
April 15,	James Adams, lot 248 - - -	1,470 00
" 15,	James Anderson, lots 258, 259 - -	2,940 00
" 22,	John Cameron, lot 244 - - -	1,365 00
" 22,	James Adams, lot 246 - - -	1,365 00
" 22,	Same, lot 237 - - - -	577 50

"B." T. KENNEDY.

Extract from minutes of 11th June, 1836.

Present, John Graham, esq., president; Messrs. Darlington, Caldwell, Bissell, Jas. Irwin, McShane, Davis and Hutchinson.

After going through the business of discounts, the president stated to the board that Mr. Caldwell had signified to him that he was desirous of declining to act as counsel for this bank; and, if agreeable to this board, would be pleased that Mr. Bradford should be appointed in his stead; whereupon resolved, that the resignation of Mr. Caldwell be accepted, and that Mr. Bradford be employed as counsel and solicitor of this institution.

"C." T. KENNEDY.

Circuit court of the United States, for the western district of Pennsylvania, in the third circuit.

No. 1, of November term, 1853.

WILLIAM J. SLICER et al.
vs.
THE BANK OF PITTSBURGH and others. } In equity.

UNITED STATES OF AMERICA,
Western district of Pennsylvania, ss.

I, Henry Sproul, clerk of the circuit court of the United States for the western district of Pennsylvania, in the third circuit, do hereby certify to the Supreme Court of the United States, that the decree, pleadings, depositions and other proceedings in the above entitled cause, hereunto annexed, are true transcripts of the originals remaining on the files of my office in the said cause.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at the city of Pittsburgh, this ninth day of September, one thousand eight hundred and fifty three, and of the independence of the United States the seventy-eighth.

[SEAL.]

H. SPROUL,
Clerk of the circuit court of the United States, western district of Pennsylvania.

Opinion of Hon. R. C. Grier.

HEIRS OF THOMAS CROMWELL
vs.
BANK OF PITTSBURGH et al. } In equity.

In C. C. of U. S., western district of Pennsylvania.

Argued May 20—23, 1853, by Alden, for complainants, and Hepburn, Wilkins, and Loomis, for defendants.

The heirs of Thomas Cromwell have brought this bill against the Bank of Pittsburgh and others, in possession of certain property, demanding an account of rents, issues, and profits thereof, since 1820, and alleging as the foundation of their claim, that Thomas Cromwell was owner of the property, and mortgaged it to the Bank, who entered as mortgagee, and received the rents far beyond the amount of their mortgage.

This bill was filed to the present term, (May, 1853,) but the Bank being anxious to have the questions raised by this case speedily decided, have filed their answer, and by consent have had the case argued upon their answer alone, and the testimony taken in support of it. The other defendants seem to have been dropped by consent, as it was admitted on the argument that the purchasers from the Bank had adverse possession for more than twenty-one years. The complainants' title

being therefore barred, they cannot demand from the owners an account of the rents of their own property.

Through a desire also to arrive at a speedy decision of the merits of the case, the respondent has taken no objection to the bill for want of proper parties; for as Thomas Cromwell died in 1850, any money due to him in his lifetime would be payable only to his executors, who are not parties to the bill.

Overlooking these objections to form, we shall proceed to examine the merits of the claim set up in complainants' bill. In order to this, a brief history of the facts, as exhibited by the pleadings and proofs, will be necessary.

In May, 1819, Thomas Cromwell was indebted to the Bank of Pittsburgh in the sum of $20,000.

To secure this sum he executed a mortgage of his real property to the Bank, being two lots in the city of Pittsburgh, and one hundred and seventy-six acres in the reserved tract opposite Pittsburgh, then a farm, but now covered with a thriving town, a suburb, and likely soon to become a portion of the city of Allegheny.

This mortgage was duly recorded, and a sci. fa. issued thereon, returnable to August term, 1820. Cromwell accepted service of the writ, and on the 17th of November, 1820, he went with Mr. Wilkins, the attorney of the Bank, to the prothonotary's office; a calculation of the balance due was made, and Cromwell agreed to confess a judgment for the amount. The only evidence of this confession now to be found among the records is the following paper, filed and endorsed at the time by the clerk:

"ALLEGHENY COUNTY, *ss.*

"No. 136, August term, 1820.

"THE BANK OF PITTSBURGH
vs.
THOMAS CROMWELL. } Sci. fa. sur mortgage.

"In my proper person I this day appeared before the prothonotary, in his office, and confessed judgment to the plaintiff for $21,740 40, besides costs, with a release of all errors, without stay of execution, and that the plaintiff shall have execution by levari facias, to November term, 1820.

"THOMAS CROMWELL."

Which paper was endorsed, "Filed September 13th, 1820.
"WM. PENTLAND."

The folio or large docket (into which the original entries of the acts, orders, and judgments of the court are usually copied from the rough docket) formerly contained no memorandum of the judgment. The rough docket, in which the entry or memorandum of the confession of judgment would be made, is now lost.

At the same time Mr. Wilkins filed his præcipe, (reciting a judgment on the mortgage,) for a writ of levari facias, which was also issued on the same day. The writ was delivered to the sheriff. At that time, (in 1820,) an appraisement law existed in this State; but Thomas Cromwell, to save costs and expedite the sale, signed the following agreement on the back of the levari facias:

"I, Thomas Cromwell, the within defendant and mortgagor, acknowledge to have received from Sheriff Neville due and regular notice of the time and place of holding the inquisition and appraisement upon the within described property. And I do hereby release all errors touching the premises. September 18, 1820.

"THOMAS CROMWELL."

On this writ of levari facias the sheriff proceeded to sell the mortgaged property. The Bank, being the highest bidder, became the purchaser for the sum of $13,120. On the eighth of November, 1820, a deed was executed by the sheriff to the Bank, and acknowledged in open court. In the spring of 1821, Thomas Cromwell delivered up the full possession to the Bank, and left the country. The Bank proceeded to sell out the property in lots or parcels through the course of eight or ten years, so as to realize, if they could, the amount of their debt. In the year 1836, some of the purchasers from the Bank finding the original or rough docket was lost, and that no entry or minute of the judgment was in the folio or larger docket, moved the court to have it amended by making the entry nunc pro tunc. As the paper filed, and the præcipe and writs, showed clearly that a judgment had been confessed, and that, if not docketed, it was a gross clerical misprision, the court of course ordered the amendment to be made.

Cromwell died in 1850, having never (during the thirty years which the Bank and its vendees have held this property, claiming it in absolute fee simple) pretended any claim to an equity of redemption, or demanded any account of rents, or made any entry to effect the notoriously adverse possession of those who claimed and held under this sale by the sheriff.

On this case the complainants have endeavored to establish the following propositions:

1st. That there was no judgment of the court which would authorize a writ of levari facias; and

2d. That the sale by the sheriff being for this reason void, the equity of redemption still subsists, and the mortgagee is bound to account to the mortgagor for the rents and profits, which, as such, he might or ought to have received for the thirty-two years during which the Bank and its vendees have had possession.

As the complainants have clearly no case, unless both the facts asserted, (viz: that there is no record evidence of a judgment,) and the inference founded on it, are both correct, we shall examine: 1st, Whether the inference is correct if the fact be assumed; and 2d,

Whether the fact asserted, as the foundation of the claim, be not itself disproved by the admissions of the bill.

1st. Assuming, for the present, the truth of the complainants' assertion, that the record in evidence does not show a legal judgment as a foundation for a writ of levari facias, have the complainants shown themselves entitled to a decree on the other admitted facts of the case?

On this assumption their case stands thus: The mortgagee takes possession of the mortgaged premises, claiming to be the owner of the equity of redemption, and of an indefeasible estate in fee. The mortgagor, not disputing the validity of his claim, delivers the possession. The mortgagee and his vendees remain in possession, claiming the absolute fee for thirty years, rendering no account to the mortgagor, and denying his right to any, or that there is any subsisting trust or privity with the mortgagor. Will equity, under such circumstances, decree an account, or interfere with the legal title of the mortgagee? Most certainly not. It is a settled rule of equity, that "if the mortgagor permits the mortgagee to hold possession for twenty years, without accounting, or without admitting that he possessed the mortgage title only, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it previously was at law. (See 2 Story Eq., sec. 1028, &c.) Chancery will not interfere in favor of the mortgagor, after twenty years, when the entry of the mortgagee was equivocal, or only under his defeasible legal title, and where no account has been rendered or demanded, or other acknowledgment of privity, trust or subjection to the claim of the mortgagor; much less when the mortgagee claimed, and the mortgagor admitted the equity of redemption to be foreclosed, and when the purchasers, for a full consideration from the mortgagee, have been in possession, making valuable improvements, claiming adversely to all the world for more than twenty years; for if, after such a great length of time, it should be discovered that there was some informality or irregularity in the proceedings intended to foreclose the mortgage, and for which the sale for that purpose might have been avoided, instead of being a reason why equity should interfere in favor of the mortgagor, it is the most conclusive reason to the contrary. It proves the very facts to exist, which equity presumed to exist, from length of time alone, to wit, that the mortgagee did not hold in trust, or in priority with, or subjection to, the rights of the mortgagor.

But if length of time, and the staleness of the complainants' claim, were not of themselves a conclusive objection to it, does not the case show acts and conduct of Thomas Cromwell which should operate as an equitable estoppel to the claim now advanced?

In Pennsylvania, where they had no courts of equity, the proceedings by scire facias in a court of law, and writ of levari facias, and sale thereon, is substituted by statute for a bill in equity to foreclose a mortgage. Now, let us suppose a bill filed by the mortgagee to foreclose the mortgage, and that the mortgagor, knowing that the land is not worth the money secured on it, and his equity of redemption is worth-

less, makes no objection to the foreclosure and sale; but, instead of filing an answer to the bill, agrees with the mortgagee to expedite the sale, and waive all matters of form; that he signs a written acknowledgment to be filed of record, admitting that the whole amount of mortgage money is due, and agreeing that a master may proceed to sell the premises immediately, in discharge of the mortgage; that he waives a valuation; that he delivers up possession to the purchaser; that he stands by, without objection, and sees purchasers, for large and valuable consideration, expend large sums in improvements, on the faith of the title thus acquired. Would a court of equity, under such circumstances, entertain a bill for an account, and treat the purchasers as trustees for the mortgagor, on the plea that he has since discovered a flaw or irregularity in the proceedings, and that there was no formal decree of the court foreclosing the mortgage? Surely it would not; and I need not attempt to fortify that assertion by a reference to the very numerous cases to be found, both in law and equity reports, on the subject of estoppel in pais. Yet the hypothetical case I have stated is the one substantially set forth in the bill of complaint and evidence now before us.

Cromwell gave his written assent to the sale, and assisted to expedite it, and thus encouraged purchasers to believe they obtained an indefeasible estate, and cannot now be permitted in a court of equity to assert the contrary.

2d. Thus far we have considered this case, on the assumption that the allegation of the bill, which is the whole foundation of the claimants' title, is true, to wit: That the record of the proceedings on the scire facias shows no judgment to support the writ of levari facias, and that the sheriff had no authority to sell. We shall now proceed to show that this allegation of the bill is wholly unfounded in fact. And, 1st, That even without the amendment of the docket made in 1836, there is sufficient record evidence of a judgment. 2d. That, if it were absolutely necessary for the validity of a judgment that it be recorded in a book or docket, there is sufficient evidence that such a docket record was made, and is now lost or destroyed.

3d. That the amendment (though not strictly necessary) was properly made, and being made, is absolutely conclusive between these parties.

It would lead to most absurd and mischievous consequences, if we should attempt to test the validity of the records of the courts of Pennsylvania, by a comparison with those of the King's Bench and common pleas in England, or those perhaps of any other civilized state or country.

In early times, one of the justices of the court had possession of the seal, signed all writs and judgments, took bail, and performed all the functions of the prothonotary.

This continued to be the case until the adoption of the new constitution in 1790. After that time, and until the present constitution was

adopted, the prothonotary was appointed by the governor; now he is elected by the people.

The Judiciary act of the 13th of April, 1791, provides that these "prothonotaries shall have the like power to sign all judgments, writs, or process, &c., as they had for those purposes when they were justices of the court."

Since that time, the prothonotary has exercised many quasi judicial functions; parties appear before him and confess judgment ore tenus, in vacation, or at any time; or, it is entered upon a præcipe or written order from the party, or on a general power of attorney, or any other acknowledgment or agreement of the party to confess a judgment, whether written in the present or preterite tense. (See Cooper & Gillett, 8 S. & R., 568; McCalmont & Peters, 13 S. & R., 196; Reid & Haines, 4 Watts, 441.

But these prothonotaries, notwithstanding they exercised such enlarged powers, were too often appointed or elected, without any regard to their capacity to perform the duties of their office.

Wholly ignorant of law and legal forms, they became a law unto themselves. There was no system, rule, form, or precedent adhered to; judgments were seldom or ever signed by the clerk or judge. No judgment roll or record proper is ever engrossed. Minutes of the acts and judgments of the court are made sometimes by the clerk in the minute book of the term, sometimes by the judge on the trial list, or in the rough docket, or endorsed on a case stated, or declaration, or other paper on file. Generally, a large folio docket is kept, into which these minutes, whether found in the rough docket, book of minutes of court, trial list, or elsewhere, are collected and copied in a fair and legible hand.

This duty is usually performed after every term, with more or less attention to accuracy and correctness, but often with many and important omissions. But all these entries, whether found in this docket or not, are but the minutes from which a formal record may be made, but in fact never is made. They are made as brief as possible, and are mere short intimations of what the record ought to be when drawn out in form. For the purpose of notice to purchasers, as regards liens, a minute of the judgment must be made in a certain docket called a Judgment docket. But the want of this registry does not affect the judgment inter partes. None of these dockets has any title to be called the record of the court. Minutes of the acts of the court found in the trial or argument list, in the handwriting of the judge, or endorsed on a case stated, or any other document or agreement of the parties, or their counsel, filed in the suit, furnish as proper materials from which to draw out a proper technical record, as the short minutes copied into the folio docket. These minutes, whether made by the judge, the clerk, or an attorney, are always brief and informal; usually the word "Judgment" connected with the date and amount; or, "Judgment for sum due," leaving the clerk to compute it, is all the actual record

that is made. When judge of the State court, I have entered many thousands in that way, and never signed one drawn up in legal form.

The "ideo consideratum est" of a formal record of judgment is nowhere to be found. When a defendant is willing and desirous to confess judgment, he may do it on the back of the writ or narr, or by any other paper put on file, or he may come in propria persona before the prothonotary. There is no given form for such writing, or for the mode of recording the fact. Usually, when an agreement or acknowledgment, such as is found in this case, has been put on file, the entry made by the clerk on the rough docket would be "September 13, 1820, judgment confessed; see paper filed with writ." A more careful clerk would transcribe the substance of the agreement, and a very careful one would have written out a copy on the rough docket, and have required the party to sign it. And I have known one prothonotary, (a very worthy man, but somewhat eccentric in his orthography,) who would have made the following minutes only: "Ceptr. 13th, gugt." Yet with this paper on file to show the amount and terms of the judgment, and with the help of which a formal record might have been drawn up, no lawyer acquainted with the practice and records of Pennsylvania should venture the assertion that there was no judgment.

In Penn, The Commonwealth, (6 Harr., 104,) the late Chief Justice Gibson complains that the same laxity and disregard of legal forms are to be found in criminal cases. "Our looseness," says he, "in recording forms of procedure, especially in criminal cases, if we have any forms left, has grown till the knowledge of the principles of which they were exponents has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record of a conviction for murder."

A certified copy of the docket entries is not legal evidence of a record. All the papers on file, with other endorsements, are as much entitled to that name. (See Lererenge vs. Dayton, 4 Wash., C. C. R., 698.)

A clerk who understands his business and duties would use these documents and memoranda, whether on the docket or on file, as a frame on which to construct a formal record, with all the verbiage to be found in Saunder's Reports, or the appendix to 3d Blackstone.

If the court in this case had refused to receive (as they might well have done) the docket, memoranda, and other papers, read without objection as record, and required a formal record, certified under the seal of the State court, the prothonotary would have been justified, nay bound, to certify a judgment in the case, as entered on the 13th September, 1820, by confession, or nil dicit, with the "ideo consideratum est," and any and all other terms of art to satisfy the most fastidious formalist.

The confession of judgment on file in this case is itself the original, and as much a part of the record or minutes from which a formal record may be made, as any other paper or docket memorandum in the case.

The amendment of the docket, made in 1836, was in fact superfluous and unnecessary as between the parties to the judgment. It was an amendment of the docket, not of the record. The omission of such registry being a palpable oversight or neglect of the clerk who copied the minutes of the record into that docket, it could be remedied at any time by the clerk, even without an especial order of the court to authorize it.

2d. Assuming that a registry of the minute of judgment in a docket is absolutely necessary to its legal existence, there is no law which requires it to be made in a large and not in a small docket—in a folio bound in Russia leather, and not in a common bound and rough docket; or that the original would not be as good record evidence, if it was in existence, as a copy. The omission of the clerk to copy the entry of a judgment into the larger docket would not invalidate it. The course pursued by the prothonotary, of making the minutes and entries first in the rough docket which is now lost, leaves it altogether probable, if not certain, that the only omission of duty has been a neglect to afterwards copy it into the folio docket.

But this presumption is legally conclusive when connected with the other facts of the case. The written acknowledgment on file, the recital of the precipe, the writ of lev. fa. reciting a judgment, the endorsement by the defendant on the writ, the sale made with the concurrence of the defendant, remaining unquestioned by him during his whole life and for the space of thirty years: these facts can leave no doubt that the lost docket contained a record of the judgment on which the writ of levari facias and sale by the sheriff were founded. If, after such a length of time, titles could be called in question for want of some writ, docket or other memorandum, no man's property in Pennsylvania would be safe; and more especially would this be the case in Pittsburgh where process of execution, on which valuable titles depend, instead of being on the files of the court, are often found among the papers of deceased attorneys and sheriffs in Ohio and elsewhere, and where the archives of the court are treated as useless lumber.

The case of Shaw and Boyd, (12 Penn. State Rep., 2 Jones, 215,) would have been without difficulty, if any paper on file had shown that a judgment had been entered, as in the present case. There, on the issue of "nul tiel record," the court presumed that a judgment had been entered in 1820, from lapse of time and other circumstances. The probability is, says the court, "that judgment was entered on the back of the paper containing the case stated or special verdict. That paper is now lost or mislaid, and cannot be found. Strong presumptions are tolerated and allowed in favor of records irregularly kept after a great length of time."

3d. But, lastly, assuming it to be absolutely necessary that the entry of judgment should be copied into the folio docket, in order to give it validity, the omission to do so is a clerical error, or misprision, which may be amended at any time, and the amendment, when made, is conclusive, and cannot be denied or questioned in a collateral suit.

A court may possibly not have the power to alter or vacate its own judgments, truly recorded, after the term to which they have been entered; but that any misprision, omission, or mistake of the clerk may be amended at any time, where the record shows any thing to amend by, has never been doubted since the statute of I. Ed., 3, c. 6. It is a power vested in every court, and one which it is their duty to exercise in a proper case, in order that suitors may not suffer by the carelessness or mistakes of clerks and officers. It is a power committed to the discretion of the court, to be exercised over their own records, and the correct use of that discretion cannot be questioned by another court, even on a writ of error. The jurisdiction of the court does not depend on the consent or presence of the parties to the suit, but on the power of the court over its own records. A record is received as absolute verity, and it is the duty of the court to see that it speaks the truth, and the whole truth. If the amendment made is according to the truth, the parties have no right to complain. If it be alleged that the amendment was ordered on a false suggestion, the party making such allegation should apply to the court to vacate or set aside such order for that reason. The court of common pleas of Allegheny county having decided that a judgment was confessed by Cromwell, on the 13th of September, 1820, and that it should have been entered by the clerk on the docket, and having ordered that omission to be amended nunc pro tunc, it is conclusive evidence to this court that such a judgment was rendered or confessed on the 13th day of September, 1820. The complainants in this case cannot question its propriety or deny its effect. Their case is, therefore, without foundation in fact or in law.

That the doctrines which I have just stated are not mere dogmas of my own, but are supported to their fullest extent by precedent, it may not be improper to refer to a few of the very numerous cases to be found in the reports of Pennsylvania on this subject.

In Maus vs. Maus, (5 Watts, 319,) the court say, "It is never too late to amend the record merely for the purpose of correcting a misprision of the clerk."

In Owens vs. Simpson, (3 Watts, 58,) it is decided, "That not only has every court the power, but it is its duty, to amend a clerical error, which stands in the way of justice, and when it is evident the defect was produced by the blunder of the prothonotary. To suffer the misprision of the clerk to destroy the title of a purchaser, with such materials for amendment, would be inconsistent with the liberality which is so conspicuous a feature of the day.

In Murray vs. Cooper, (6 Sergeant & Rawle, 126,) a judgment given in 1808 was neglected to be recorded, and in 1816 the court amended the record by ordering a judgment to he entered as of August term, 1808. On error brought to reverse this amendment, the Supreme Court decided that it was not the subject of review on a writ of error, and say that "the court has power, in order to do justice, to enter judgment at their discretion, as of a past term, when it ought to have

been entered. They exercised that discretion—they had a right to do so, and we cannot say they have abused it."

In Wilkins vs. Anderson, (11 Pennsylvania State Reports, 399,) a memorandum found on an old trial list, in the handwriting of the judge, was considered sufficient record evidence that a person was substituted as defendant, where the docket entry of the verdict and judgment, and the other papers in the case, showed another person as the defendant. And the court say: "This entry on the trial list being among the archives or monuments from which a record may be made at any distance of time, the record might be amended at any time."

In Destaas vs. Brown, 2 Barr, 339, the court say: "It is only by patching up errors in matters of mere form, arising from inexperience consequent on the popular principle of rotation in office, that we can hope to preserve the substance of justice."

In Rhoads vs. The Commonwealth, 3 Harris, 372, the court state it as a "plain legal truth, which ought not to have been brought in question, that the court having the power to amend, the regularity of the amendment cannot be inquired into collaterally." So also in Stickles vs. Overton, 3 Barr, 325; 7 Serg. & R. 180, &c., &c., &c.

These are but a few of the cases on this subject, and an examination of them will show amendments of clerical omissions and misprisions, "reconstruction of the whole fabric of writs," presumptions of records far beyond any charity which need be invoked to hide the trifling omission in this case, so easily corrected, and afterwards actually and conclusively amended. Much of the most valuable property in Pennsylvania has gone through the hands of the sheriff, and nearly all through the orphans' court more than once. In most of these cases the titles now depend on the preservation of loose papers and other documents, by officers selected too often with little regard to any principles save that of rotation, whereby skill and experience are often superseded by ignorance and incompetency. A rigid scrutiny into the records made thirty years ago, in Allegheny county, would, perhaps, find few in which the documents are better preserved, and the title more free from difficulty than the present. And it is due to the learned counsel who acted for the bank in 1820, (Mr. Wilkins,) to say, that in my considerable experience, for twenty years past, in the examination of titles through judicial sales, made about that period in Pittsburgh, I have not found any case wherein more vigilance and care has been exercised by the attorney to anticipate and obviate difficulties likely to occur from the negligence or incapacity of the public officers. He has taken the unusual precaution to put on file a written confession of judgment, as if he had foreseen the future neglect to enter it in the continuance docket, and the destruction of the original docket.

He also took the farther precaution to have an endorsement on the writ of levari facias, signed by the defendant, waiving notice, releasing errors, and conclusively showing his consent to and participation in expediting the sale. And what is of vastly more importance, he has taken care that the writ of levari facias, the most essential record document

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in defendant's title, should be returned by the sheriff and filed among the archives of the court, and not (as in very many other cases) carried away by the sheriff out of the State, and to be found only, if found at all, in the lumber garrets of a distant city.

It is with much satisfaction, too, that I have to remark, that though time, in the revolution of the third of a century, may have destroyed records, he has dealt gently with our learned brother; and though "the almond tree may flourish," he remains with unabated vigor, as heretofore, the example and ornament of our profession.

The bill of complainants is dismissed, with costs.

Per cur. R. C. GRIER, *Circuit judge.*

UNITED STATES OF AMERICA,
Western district of Penn'a, sct:

I, Henry Sproul, clerk of the circuit court of the United States, for the western district of Pennsylvania, in the third circuit, do hereby certify that the foregoing is a true and correct copy of the opinion delivered by the court in the case of the heirs of Thomas Cromwell vs. The Bank of Pittsburgh et al., No. 1, of November term, 1853, in equity.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Pittsburgh, this 12th day [SEAL.] of December, A. D. 1853, and of the independence of the United States the 78th.

H. SPROUL, *Clerk.*